International Brotherhood of Electrical Workers, Local 47 and International Brotherhood of Electrical Workers, Local 440 and Pouk & Steinle, Inc. and Southern California District Council Of Laborers, Local 1184. Cases 21–CD–665 and 21– CD–666

March 19, 2009

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Pouk & Steinle, Inc. (the Employer) filed charges on June 26 and 27, 2008, alleging that International Brotherhood of Electrical Workers, Locals 47 and 440 (collectively, IBEW Locals) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by IBEW Locals rather than to employees represented by Southern California District Council of Laborers, Local 1184 (Laborers). The hearing was held on October 14, before Hearing Officer Patrick J. Cullen. Thereafter, the Employer and IBEW Locals each filed a posthearing brief in support of their positions, and Laborers filed a brief in support of its motion to quash the notice of hearing.²

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.³

I. JURISDICTION

The parties stipulated that the Employer is a California corporation with a principal place of business in Riverside, California, and a wholly-owned subsidiary of Construction Services, Inc. located in Bismark, North Dakota. They also stipulated that, during the past calendar year, the Employer purchased and received goods at its facility in Riverside, California, valued in excess of \$50,000 directly from points located outside the State of California. Accordingly, the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Finally, the parties stipulated, and we find, that IBEW Locals and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a subcontractor engaged in the electrical contracting business. By virtue of its membership in the National Electrical Contactors' Association, the Employer is signatory to a collective-bargaining agreement with IBEW Local 47⁴ and two collective-bargaining agreements with IBEW Local 440.⁵ These collective-bargaining agreements require the Employer to employ employees represented by IBEW Locals to perform electrical work, and the Employer has a long-standing practice of doing so.

The Employer has never had a direct bargaining relationship with Laborers. Effective September 11, 2006, the Employer entered into a subcontracting agreement with Sully-Miller Contracting Company (Sully-Miller subcontract), covering all applicable electrical work performed on an underground substructure for high voltage distribution for street lighting and traffic signals in Riverside, California (the Van Buren Project).⁶ The Sully-Miller subcontract incorporates by reference the 2006-2009 Laborers' master labor agreement (LMLA). The LMLA contains a jurisdictional clause that includes work on "electrical transmission line and conduit projects" and a subcontracting clause stating that: "Subcontractor agrees that it is bound to and shall comply with all of the terms and conditions of the [Laborers'] Master Labor Agreement . . . including wages, trust fund contributions, working rules, the grievance/arbitration procedure . . . on all covered work performed in the geographic area of the [Laborers'] Master Labor Agreement." The Sully-Miller subcontract additionally states that "Subcontractor acknowledges that [Laborers] are the intended third party beneficiaries of the contractual provision and may en-

¹ All dates hereafter are 2008, unless otherwise indicated.

² On November 6, Laborers filed a Motion to Strike Portions of the Charging Party's Brief. On November 11, the Employer filed an Opposition to Laborers' Motion to Strike. The Motion to Strike requests that, pursuant to Sec. 102.24 of the Board's Rules and Regulations, the Employer's introductory paragraph and some arguments in its posthearing brief be struck because they are premised on facts and assumptions not in the record. We deny the motion as moot, because our decision here does not rely on those portions of the Employer's posthearing brief.

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act.

⁴ The agreement's scope of work includes "all work necessary for the installment of all types of underground ducts, or raceways used as enclosures for electrical conductors."

⁵ The agreements' scope of work "is intended to cover electrical work on public streets and freeways, above or below the ground." The respective work assigned to employees represented by IBEW Local 47 and IBEW Local 440 does not overlap.

⁶ The Scully-Miller subcontract itemizes the work covered under the agreement (Items 023–105), including the disputed work.

force this provision directly against the Subcontractor." The subcontract did not include a copy of the LMLA or its jurisdiction clause. After executing the subcontract, the Employer assigned the work to employees represented by IBEW Locals.

IBEW Local 47 Business Manager and Financial Secretary Patrick Lavin testified that, prior to the Employer's assignment of the work to employees represented by IBEW Locals, Laborers Business Manager John Smith told him that all work relating to "digging holes in the ground" belonged to employees represented by Laborers.⁷

On March 25, after employees represented by IBEW Locals had nearly completed work on the Van Buren Project, the Construction Laborers Trust Fund for Southern California Administrative Company, LLC (Laborers' Trust) filed suit against the Employer in Federal court seeking fringe benefit contributions for hours worked by the Employer's employees on the Van Buren Project, plus interest, liquidated damages, and audit costs. John Miller, the management-side cocounsel of the Laborers' Trust, testified that the decision to file the lawsuit against the Employer was made by the Laborers' Trust Delinquency Committee, of which Laborers' representatives Smith, Mike Quevedo, and Sergio Rascon are members. Miller added that Laborers and the Laborers' Trust share the same counsel, and that it would not have pursued the work if it was not covered by the Laborers' collectivebargaining agreements.

Shortly after the suit was filed, Smith requested a meeting with Employer President Bob Briscoe to request that the Employer become a signatory with Laborers. Briscoe testified that Smith "wanted to impress upon" the Employer that the Van Buren Project was "Laborers' work" and "not IBEW's work," and mentioned a couple of times that "he was going to get us." Smith further told Briscoe that, if the Employer were to become a Laborers' signatory, Laborers could make the Laborers' Trust lawsuit "go away."

The Employer in turn notified IBEW Locals officials, and both locals responded by letters, dated June 6 and 20, respectively, demanding the work on the Van Buren Project and threatening to "take economic action" to ensure that the work remained assigned to employees represented by IBEW Locals. On June 26 and 27, the Employer filed the instant charges against IBEW Locals, alleging violations of Section 8(b)(4)(D).

All work on the Van Buren Project was completed by employees represented by IBEW Locals in August.

Thereafter, on September 23, Laborers Representative Quevedo informed the Employer by letter that Laborers "have not claimed and are not currently seeking or otherwise claiming . . . any Project work at the [Van Buren] Project."

B. Work in Dispute

The work in dispute is all of the Employer's work on the Van Buren Project.⁸

C. Contentions of the Parties

Laborers moves to quash the notice of hearing on the grounds that it has never sought the assignment of Van Buren Project work to employees it represents. In support, Laborers contends that, contrary to Briscoe's testimony, Smith never demanded the work on behalf of Laborers and Laborers had disclaimed interest in the work. Further, Laborers argues that the Laborers' Trust lawsuit was neither filed nor prosecuted by Laborers; rather, the Laborers' Trust brought the lawsuit in its capacity as a fiduciary of the Laborers' Health and Welfare Trust Fund. Laborers also contends that the Laborers' Trust lawsuit does not seek the assignment of the work, but rather demands delinquent contributions.

IBEW Locals and the Employer respond that the totality of the circumstances establishes that Laborers demanded the work in dispute. IBEW Local 47 contends that the filing of the Laborers' Trusts' lawsuit, coupled with Smith's comment that Laborers could make the lawsuit "go away" if the Employer signed an agreement with Laborers, constitutes a demand for the work. Noting that Laborers and the Laborers' Trust were represented by the same counsel, the Employer argues that they coordinated their efforts, and that the Laborers' Trust would not have pursued the lawsuit if Laborers had disclaimed the work. Further, the Employer contends that Laborers' purported disclaimer of the work is disingenuous because it came after the project was completed, and in any event was not clear, unequivocal, and unqualified because it was signed by the business manager of Laborers' district council, not by an official of Laborers.

⁷ Laborers Business Manager John Smith did not testify at the hearing.

⁸ Testimony at the hearing clarified that this work involved all work on the underground conduit for underground street lighting and traffic signals at the Van Buren Project.

⁹ Laborers further moves to quash on the grounds that work on the Van Buren Project has been completed and that disputes over the work are unlikely to recur. We find this contention unavailing. Thus, "the mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur." See *Millwright Local 1906 (Chicago Steel)*, 310 NLRB 646, 648 fn. 8 (1993), citing *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987). See also *Iron Workers California District Council (Madison Industries)*, 307 NLRB 405, 407 fn. 5 (1992).

Finally, the Employer contends that the disputed work should be awarded to employees represented by IBEW Locals based on the factors of collective-bargaining agreements, employer preference and past practice, and relative skills. IBEW Locals each contend that the disputed work should be awarded to employees they represent based on the factors of collective-bargaining agreements, employer preference and past practice, relative skills, and area and industry practice. IBEW Local 47 additionally contends that the factor of economy and efficiency favors an award of the disputed work to employees it represents.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees;¹⁰ (2) a party has used proscribed means to enforce its claim to the work in dispute;¹¹ and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.¹² On this record, we find that this standard has been met.

1. Competing claims for work

It is undisputed that the IBEW Locals claimed the work in dispute for the employees they represent, and these employees performed the work.

Laborers asserts that it did not claim the work in dispute. Rather, it contends that the Laborers' Trust filed suit only to demand delinquent contributions and that Laborers had, in fact, disclaimed the work. Laborers, therefore, urges the Board to grant its motion to quash.

Contrary to Laborers' contention, there is evidence that Laborers, through Smith, demanded the work in dispute. Thus, Lavin testified that Smith told him that any underground work belonged to Laborers. Further, Briscoe testified that Smith told him that work such as that on the Van Buren Project belonged to employees represented by Laborers and not to employees represented by IBEW Locals, and warned him that "he was going to get us." ¹³

Next, we find Laborers' purported disclaimer of interest in the work is ineffective. The disclaimer was not made until September, 1 month after the work was completed and shortly before commencement of the hearing in this matter. "Although it is well settled that an effective renunciation of work in dispute resolves a jurisdictional dispute, the Board will refuse to give effect to 'hollow disclaimers' interposed for the purpose of avoiding an authoritative decision on the merits." Laborers Local 81 (Kenny Construction Co.), 338 NLRB 977, 978 (2003) (footnotes omitted) (disclaimer of future work offered at the start of the hearing when 90 percent of disputed work was complete found ineffective), quoting Mine Workers (Con-Serv, Inc.), 299 NLRB 865, 868 (1990).

2. Use of proscribed means

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As described above, in their letters to the Employer dated June 6 and 20, respectively, IBEW Locals each threatened to "take economic action" to ensure that the work remained assigned to employees it represents.

3. No voluntary method for adjustment of dispute

We further find that there is no agreed upon method for voluntary adjustment of the dispute. The Employer and IBEW Locals so stipulated at the hearing, and Laborers, while neither admitting nor denying the same, provided no argument or evidence to the contrary.

Based on the foregoing, we find that there are competing claims for the disputed work, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed upon method for voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination and deny Laborers' motion to quash the notice of the hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors.¹⁴ The Board has held that its determination in a

Carpenters Local 275 (Lymo Construction Co.), 334 NLRB 422, 423 (2001).
 See, e.g., Electrical Workers, Local 3 (Slattery Skanska, Inc.), 342

¹¹ See, e.g., Electrical Workers, Local 3 (Slattery Skanska, Inc.), 342 NLRB 173, 174 (2004).

¹² Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1139 (2005)

<sup>1139 (2005).

13</sup> Given the specific facts of this case, Member Schaumber would also rely upon the Laborers' Trust lawsuit as evidence establishing that Laborers demanded the work in dispute. In particular, he notes the timing of the suit, Smith's statement that the lawsuit would "go away"

if the Employer became a signatory to a Laborers' contract, and the fact that the decision to file the lawsuit was made by the trust's Delinquency Committee, of which Laborers representatives Smith, Quevedo, and Rascon are members. In light of the other evidence establishing that Laborers claimed the work in dispute, Chairman Liebman finds it unnecessary to address the issue of whether the Laborers' Trust lawsuit would support such a finding. See generally *Laborers* (*Eshbach Bros., LP*), 344 NLRB 201, 202 fn. 4 (2005) (personal statement of then-Member Liebman discussing cases in which Board has relied upon contract-based legal claims to find that union claimed work in dispute).

¹⁴ NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting), 364 U.S. 573, 577 (1961).

jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case.¹⁵

Based on the following factors, which we find are relevant to determining this dispute, ¹⁶ we conclude that the Employer's employees represented by IBEW Locals are entitled to perform the work in dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated that there are no Board certifications concerning the employees involved in this dispute.

The evidence shows that the Employer has two collective-bargaining agreements with IBEW Local 47, and one with IBEW Local 440. It is undisputed that the Scope of Work sections in these agreements covers the disputed work. The Employer is also signatory to the Scully-Miller subcontract agreement, which incorporates the LMLA by reference. There is no dispute that the Scully-Miller subcontract, through its itemized scope of work, covers the disputed work. Accordingly, we find that the factor of collective-bargaining agreements does not favor awarding the disputed work to any of the groups of employees.

2. Employer preference and past practice

Employer President Bob Briscoe testified that the Employer prefers to assign the disputed work to employees represented by IBEW Locals. Briscoe also testified that the Employer had a past practice of hiring employees represented by IBEW Locals to perform work of the kind in dispute. Accordingly, we find that the factor of Employer preference and past practice favors an award of the work in dispute to employees represented by IBEW Locals.

3. Area and industry practice

Local 47 Business Manager and Financial Secretary Patrick Lavin and Local 440 Business Manager Robert Frost each testified that the Employer and other contractors perform work similar to the kind in dispute using employees represented by IBEW Locals, and that employees represented by Laborers have not historically performed the disputed work. Laborers presented no

evidence that its employees have performed the disputed work. Accordingly, we find that the factor of area and industry practice favors an award of the work in dispute to employees represented by IBEW Locals.

4. Relative skills

Lavin testified that employees represented by IBEW Locals are certified to perform electrical work of the kind in dispute and are "skilled and experienced in the operation of the equipment that's used" for performing that work. Laborers presented no evidence that its employees have the skills to perform the disputed work. Accordingly, we find that the factor of relative skills favors an award of the work in dispute to employees represented by IBEW Locals.

5. Economy and efficiency of operations

Lavin testified that employees represented by IBEW Locals have been performing the disputed work "since 1891," and that employees represented by Laborers "didn't command that type of work nor did they have any experiential level to be able to do that type of work." Laborers presented no evidence regarding this factor. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by IBEW Locals.

Conclusions

After considering all of the relevant factors, we conclude that employees represented by IBEW Locals are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by IBEW Locals 47 and 440, and not to those unions or its members. The determination is limited to the controversy that gave rise this proceeding.

Determination of the Dispute

The National Labor Relations Board has made the following Determination of Dispute.

Employees of Pouk & Steinle, Inc., represented by International Brotherhood of Electrical Workers, Locals 47 and 440, are entitled to perform all of the Employer's work on the Van Buren Project, Riverside, California.

¹⁵ Machinists Lodge 1743 (J. A. Jones Construction), 135 NLRB 1402, 1410–1411 (1962).

¹⁶ Laborers presented no evidence and took no position on these factors